In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU, a Minor by and through MRS. KAM WAI LAU, his Guardian ad Litem, et al.,

Petitioners,

vs.

ALAN H. NICHOLS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for San Francisco Lawyers' Committee for Urban Affairs as Amicus Curiae in Support of Petitioners

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INTRODUCTION

This brief is filed in support of petitioners with the consent of both sides pursuant to Supreme Court Rule 42(1). Letters exhibiting such consent are attached to our letter of transmittal to the Clerk of the Court. Reference is made to the Brief for the Petitioners for the orders and opinions below, the Court's jurisdiction, the question presented for review, the constitutional and statutory provisions involved and statement of the case.

INTEREST OF AMICUS CURIAE

The San Francisco Lawyers' Committee for Urban Affairs was organized in 1968 as an affiliate of The Lawyers' Committee for Civil Rights Under Law. The San Francisco Lawyers' Committee was formed as a means of involving the private bar in the City and County of San Francisco in the problems of discrimination and poverty. Since the organization of the Lawyers' Committee, numerous lawyers in private practice in San Francisco have under its auspices undertaken the representation of disadvantaged local citizens. Such lawyers have provided counsel to individuals, minority owned businesses and other non-profit community-based organizations, and have also appeared in law suits to remedy discrimination in housing, employment, education and the availability of public facilities. The Lawyers' Committee is committed to prompting the organized bar in San Francisco to a continuing concern with public problems. Its objective is achievement of social justice and equal rights as a reality for all. Its interest in this case arises from the denial by respondents of equal educational opportunities in San Francisco for non-English speaking children and the consequent denial of access for such children to the mainstream of life in the United States.

ARGUMENT

I

Where Disparity in Ability to Respond to Educational Opportunities May Reflect Lingering Effects of Historic State Imposed Segregation and Discrimination, Respondents Have a Duty to Show Absence of Proximate Connection or Take Remedial Action

The condition of persons of Chinese origin in California in general and San Francisco in particular is marked by a dismal history of official discrimination which extends almost to the date of admission of the state to the Union. This discrimination has infected the educational opportuni-

ties available to individuals of Chinese extraction as well as their status in general.

State discrimination specifically against Chinese can be traced to as early as 1854, when a statute disqualifying Black persons from testifying in cases in which a white was a party was construed to disqualify Chinese as well. *People v. Hall*, 4 Cal. 399 (1854). The Court reasoned that it would be "anomalous" to allow testimony by people:

> "whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impossible difference . . . ." 4 Cal. at 405.

Discrimination against Chinese in employment began not later than with enactment of the Foreign Miners Tax Act of 1853, which levied a monthly tax on foreigners as a condition of employment in mining. Ch. 61, [1853] Calif. Stats. 218. Although general in form, this statute was in fact directed at Chinese, whose payments amounted to 85 per cent of the revenue collected pursuant to it. THOMAS W. CHINN, A HISTORY OF THE CHINESE IN CALIFORNIA 24 (1969) (hereinafter cited as CHINN).

New discriminatory taxes were enacted to haunt Chinese as they moved from mining labor, for which they originally immigrated, into other occupations. See CHINK 12 (Cheng-Tsu Wu ed. 1972). Thus, a monthly head tax was enacted in 1860 for Chinese engaged in fishing. Ch. 316, [1860] Calif. Stats. 307. This was followed in 1862 by a monthly tax on all "Mongolians" 18 years old or more, unless they already paid a miners' tax or were employed in the production of sugar, rice, coffee or tea (none of which were then culti-

vated in California). Ch. 399, [1862] Calif. Stats. 462. San Francisco was not to be outdone by the legislature, as it adopted a series of ordinances penalizing Chinese-oriented laundries in one manner or another. CHINN 24.[1]

The most sweeping prohibitions, however, were embodied in the second state constitution, which was adopted in 1879, and a statute enacted pursuant to it. The constitution forbade employment of Chinese by any corporation, state, county or municipal government. CALIF. CONST. art. XIX, §§ 2-4 (1879). The subsequent legislation made it a misdemeanor for anyone associated with a corporation to employ a "Chinese or Mongolian" in any manner. Ch. 3, [1880] Calif. Stats., Amendments to the Penal Code 1.

Economic discrimination was extended from employment into property rights. An early San Francisco ordinance, for example, which was aimed at and enforced primarily against the Chinese, prohibited any person from hiring or letting sleeping rooms with less than 500 cubic feet of space per person. CHINN 24. Later, the legislature encouraged the creation of ghettoes by authorizing counties, cities and towns to adopt ordinances requiring Chinese to live outside their boundaries or inside segregated areas within their limits. Ch. 29, [1880] Calif. Stats. 22.

As late as 1921, the California electorate adopted an initiative measure which prohibited persons ineligible for citizenship from owning agricultural land (one of the prime sources of wealth in the state). [1921] Calif. Stats. lxxxvii. As a result, Chinese (and Japanese as well) not only had to refrain from acquiring new land, but even had to divest

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1. Although two of these were voided by the local county court, CHINN 24, a third survived until it encountered one of the first great civil rights decisions of this court. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

themselves of existing holdings. This statute stood up until 1952. *Sei Fujii v. California,* 38 Cal. 2d 718, 242 P.2d 617 (1952).

Not content with discrimination against Chinese already living here, California also enacted discriminatory immigration legislation. An early statute levied a head tax upon masters, owners and consignees of ships which carried in persons who could not become citizens. Ch. 153, [1855] Calif. Stats. 194. When this was ruled unconstitutional, the legislature acted directly to ban the further immigration of "Chinese or Mongolians" into the state. Ch. 313, [1858] Calif. Stats. 295. A more sophisticated enactment in 1870 granted unbridled discretion to the local commissioner of immigration to reject because of physical, mental or moral infirmity any Chinese or Japanese female who sought to immigrate. Ch. 230, [1869-1870] Calif. Stats. 330.[2] Similar legislation was directed at persons who brought in Chinese or Mongolian immigrants in general. Ch. 231, [1869-1870] Calif. Stats. 332.[3] Finally, it was a Federal court sitting in California which established the precedent for denying citizenship to Chinese even when they succeeded in immigrating. *In re Ah Yup,* 1 F. Cas. 223 (No. 104) (C.C.D. Cal. 1878).

Those Chinese who did acquire citizenship were nevertheless relegated by the people of the state to second class citizenship. The constitution of 1879 disqualified persons born in China from voting. CALIF. CONST. art. II, § 1

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2. This statute was held by this Court to be an unconstitutional regulation by a state of foreign commerce. *Chy Lung v. Freeman,* 92 U.S. 275 (1875).

3. Although this statute was also declared unconstitutional, pressures from California led to Federal legislation restricting the immigration of Chinese. See generally *Chae Chin Ping v. United States,* 130 U.S. 581, 595-96 (1889).

(1879). Later, in 1891, when the children of Chinese immigrants began to reach voting age, an English-only literacy test was passed by the legislature to keep them away from the polls. See *Castro v. State,* 2 Cal. 3d 223, 230, 85 Cal. Rptr. 20, 24, 466 P.2d 244, 248 n. 11 (1970).

The United States Commission on Civil Rights has written that:

> "The public schools traditionally have provided a means by which those newly arrived in the cities—the immigrant, and the impoverished—have been able to join the American mainstream." U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 1 (1967). (hereinafter cited as RACIAL ISOLATION).

If we accept this proposition, then the capstone of California's pervasive discrimination against Chinese lay in its efforts to exclude them from opportunities to obtain an education. At the outset, while California required that public schools be maintained for white and mandated separate schools for Black and Native American children, it made no provision whatsoever for public schooling for Chinese children. *Compare* ch. 556, § 53 [1869-1870] Calif. Stats. 838 *with id.,* § 56 at 839. The same enactment also specifically excluded "Mongolian" children from the census counts upon which allocations of state funds were to be based. Id., § 94 at 850. When the word "white" was deleted by a subsequent amendment from the basic authorization of those to whom schools were to be open, the California Supreme Court was led to rule that admission of Chinese children was required. *Tape v. Hurley,* 66 Cal. 473, 6 Pac. 129 (1885). The legislature promptly responded by passing a bill which authorized local school boards to establish separate schools for Chinese students and denied admission of such students "into any other schools" if separate schools were established. Ch. 117, [1884-1885] Calif. Stats. 100.

San Francisco was one of the communities which took advantage of the legislation to establish a segregated school system for its children of Chinese origin. See *Wong Him v. Callahan,* 119 Fed. 381 (C.C.N.D.Cal. 1902); see also *Guey Heung Lee v. Johnson,* 92 S. Ct. 14 (1971) (per Douglas, J. as Circuit Justice on application for stay).

Segregation of students of Chinese origin as established in San Francisco was strictly enforced, and efforts to persuade the legislature to end segregated schools were unavailing. See H. Lai & P. Choy, History Of The Chinese In America 99-100 (1972); Mary Lee, Problems of the Segregated School for Asiatics in San Francisco (1921) (Unpublished master's thesis at University of California, Berkeley). The school segregation statute survived for more than 60 years before it was finally repealed in 1947. Ch. 737, § 1 [1947] Calif. Stats. 1792.

The segregation of Chinese students in the San Francisco school system resulting from the combination of state and local policies was patently offensive to the Fourteenth Amendment under the standard enunciated in *Brown v. Board of Education,* 347 U.S. 483 (1954). See *Guey Heung Lee v. Johnson, supra,* 92 S. Ct. at 15 ("the classic case of *de jure* segregation").

Moreover, the education that has historically been made available by the San Francisco public school system to students of Chinese extraction has been inferior and thereby unequal even under the hoary standards of *Plessy v. Ferguson,* 163 U.S. 537 (1896). The median educational level attained by persons 25 years old or more in 1970 in Census Tracts nos. 114 and 118 in San Francisco, which encompasses the heart of Chinatown and has a population more than 90% Chinese in origin, was 5.6 years of schooling, whereas the median level of educational attainment among

the same age group for San Francisco as a whole, only about 8% of the population of which is Chinese, was markedly higher at 12.4 years. E. Gareth Hoachlander, Socio-Economic Statistical Summary for Chinatown, San Francisco, California July 11, 1973 (Unpublished report of Childhood and Government Project, University of California, Berkeley).[4]

Disparity in years of school completed, of course, is compounded by disparity in verbal achievement per year. RACIAL ISOLATION 13. The disparity in number of years of school completed understates the inferiority of education provided San Francisco children of Chinese origin, as a principal feature of the segregated schools was inferior education in the English language.[5] H. LAI & P. CHOY, HISTORY OF THE CHINESE IN AMERICA 101 (1972).

Given the history outlined above, it may reasonably be inferred that the inability to communicate in English experienced by at least those of petitioners who were born in the United States did not develop as a result of normal socialization, but reflects the lingering effects of the long standing unconstitutional discrimination against people of Chinese origin and the maintenance of inferior segregated schools for them in San Francisco. It is reasonable to suppose, so to speak, that not every root of such segregation has been tracked down and grubbed out.

The Court of Appeals assumed to the contrary, but without examining the point, that the inability of petitioners

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4. All data reportedly taken from U.S. DEPT. OF COMMERCE, 1970 CENSUS OF POPULATION & HOUSING: CENSUS TRACTS: SAN FRANCISCO-OAKLAND, CALIF. STANDARD METROPOLITAN STATISTICAL AREA (1972).

5. Inferior education in English was reinforced by the tendency of Chinese in the United States to turn inward and retain their original language in response to discrimination on other fronts in addition to education. See *Castro v. State*, 2 Cal. 3d 223, 230, 85 Cal. Rptr. 20, 24, 466 P.2d 244, 248 n. 11 (1970).

here to speak English was "the result of deficiencies created by . . . themselves in failing to learn the English language." *Lau v. Nichols,* 472 F.2d 909, 917 (9th Cir. 1973), *cert. granted,* ..... U.S. ..... (June 11, 1973). The District Court apparently gave no consideration whatsoever to the source of petitioners' disabilities.

We submit that the courts below erred in so approaching this case and that their error on this point led them into error in deciding whether the constitutional requirement for elimination of state mandated segregation imposes a duty on respondents to teach petitioners English. *cf. United States v. Texas,* 342 F. Supp. 24 (E. D. Tex. 1971).

We do not assert as a matter of law that petitioners' disabilities result proximately from San Francisco's historic policy of maintaining segregated schools for Chinese students. That, of course, is a question of fact. We do know, however, as this Court well knows from the array of litigation that has confronted it over the past 19 years, that given a "history of segregation," as the Court observed in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971), all vestiges of it will not vanish overnight without a trace merely upon issuance of a mandate for elimination.

Indeed, given a history of segregation and conditions which may be traceable to that segregation, we submit that it is not enough for respondents to plead sanctimoniously that they are delivering a racially neutral education. We submit that under such circumstances it is incumbent upon respondents to show that the current disparity between the capacity of respondents and that of other students in the district to respond to education "is in no way the result of past segregative actions." *Keyes v. School Dist. No. 1,* 41 U.S. L.W. 5002, 5008 n. 17 (U.S. June 21, 1973).

Put another way, while there is not one school black and another white, there is one group able to comprehend the education offered and another unable to do so. The constitutionally significant fact is that the latter is Chinese in national origin. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Truax v. Raich*, 239 U.S. 33 (1915). The language barrier results in a segregation and isolation within schools just as certain and effective as if respondents were maintaining separate sets of buildings for petitioners and for English speaking students. This case presents sufficient indications of complicity in petitioners' predicament on the part of respondents or their official predecessors to require reversal and remand for further hearings at which respondents, if they be so inclined, may seek to justify the present situation as not the product of discrimination.

If the respondents are unable to sustain such burden of proof, it is only equitable that they be compelled to propose remedial action which will eliminate the remaining effects of the historical discrimination "root and branch." *Green v. County School Board*, 391 U.S. 430, 438 (1968). The time for such action is now, if not long past. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

II

Respondents' Failure to Teach English to Students of Chinese Origin When They Are Conscious of Need For Such Teaching In Order to Provide Benefit From Education Constitutes Constitutionally Impermissible Discrimination

Respondents contend that in offering precisely the same classes and other educational services to petitioners as to English speaking students in the district, they are satisfying their duty under *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), to provide education, if at all, then to all on equal terms. This was enough for the District Court and for the Court of Appeals. *Lau v. Nichols*, 472 F.2d

909, 916 (9th Cir. 1973). We urge this Court to recognize error in such reasoning.

First of all, it takes no account of the education received. This Court has recognized that education implies a communication of ideas. See *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637, 641 (1950). It can scarcely be denied that communication implies receiving as well as sending and that reception in turn is illusory without comprehension.

So far as comprehension is concerned, petitioners are not only "functionally deaf," as Judge Hufstedler wrote in dissenting from the Court of Appeals denial of rehearing en banc (A. 142), they are effectively blind as well. It is all very good and well for a court to write, as the Court of Appeals did here, of each student bringing "different advantages and disadvantages" "to the starting line of his educational career." *Lau v. Nichols, supra*, 472 F.2d at 915. We submit, however, that the same court strays into error when it holds that respondents have no duty to attempt to remedy impediments to learning which "are characteristic of a particular ethnic group." *Ibid.*

We are not dealing in this case with individual characteristics. Petitioners' language is Chinese, not English, not because of any differences in intellectual capacity or psychological condition which are as likely to occur in one ethnic group as another. To the contrary, the class of students who are not receiving an education is distinguished by its Chinese national origin.[6] If petitioners were receiving

6. Although this case is brought on behalf of Chinese speaking students, the arguments in this section and the next apply with equal force to the cause of other non-English speaking children in the classrooms of Respondents and other public school districts. Thus, the decision of this Court may affect as many as 5 million children in the country who, because of national origin, have a first language other than English. Dept. of Health, Education & Welfare, Draft: Five-Year Plan 1972-77: Bilingual Education Program (August 24, 1971).

an education in proportion to their intellectual capacity we would have no complaint. However, when respondents utilize English exclusively for classroom communication without purporting to serve any compelling state interest[7] and thereby deprive petitioners of an education because of their Chinese origin without regard to their intellectual capacity, we submit that they run afoul of the Fourteenth Amendment. *Compare, e.g., Graham v. Richardson,* 403 U.S. 365 (1971), *with McLaughlin v. Florida,* 379 U.S. 184 (1964)

Moreover, the existence of non-English speaking Chinese students in respondents' schools is not a transitory phenomenon. The data showing 1790 students in the class represented by petitioners and 1066 additional Chinese-speaking students in respondents' schools who were receiving special education in English were as of the 1969-1970 school year.[8] The problems had existed before then, and the Court of Appeals noted that these numbers continue to reflect the dimensions of the situation even in the 1972-1973 school year. *Lau v. Nichols,* 472 F.2d 909, 910-11 n. 1 (9th Cir. 1973). Respondents claim an absence of responsibility for petitioners' plight, not lack of awareness of it.

Some courts would find such discrimination by reference to ethnicity enough to impose upon respondents the affirm-

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7. Section 71 of the California Education Code, which formerly required the use of English exclusively in public school teaching, was amended in 1967 to establish as the policy of the state merely that all pupils master English. CALIF. EDUC. CODE § 71 (West 1969). This implies only that English be taught (presumably to petitioners as well as other students).

8. Such data, incidentally, are silent as to the number of Chinese of school age in San Francisco who have avoided enrolling in school or "dropped out" because of the language barrier. The data available in the *Keyes* case, for example, showed a substantial drop in proportion of Spanish-speaking students from elementary through high school, which may be associated with discouragement at language barriers. *Keyes v. School District No. 1,* 41 U.S.L.W. 5002, 5004 n. 7 (U.S. June 21, 1973)

ative duty of taking such steps as "reasonably feasible" to eliminate it. *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 881, 31 Cal. Rptr. 606, 610, 382 P.2d 878, 883 (1963). At the least, respondents' unrelenting failure to remedy the persistent problem of Chinese students' inability to function in English of itself warrants the inference that respondents are unconstitutionally discriminating against petitioners and should be required to compensate for the consequences of their conduct. *Cf., e.g., Gaston County v. United States,* 395 U.S. 285 (1969); *San Francisco Unified School Dist. v. Johnson,* 3 Cal. 3d 937, 958, 92 Cal. Rptr. 309, 322, 479 P.2d 669, 682 (1971) (action to preserve so-called de facto segregation transforms it into de jure segregation).

Many of the class petitioners represent, moreover, were not born in the United States, but are recent immigrants, *Compare* A. 32 *with* A. 57. As this Court has recently noted:

> "From its inception, our Nation welcomed and drew strength from the immigration of aliens." *In re Fre Le Poole Griffiths,* 41 U.S.L.W. 5143 (U.S. June 25, 1973).

Those of petitioners who have been welcomed as immigrants must find particularly galling the Court of Appeals pronouncement that they have no right to learn English, in effect, because they do not already know it. *Lau v. Nichols,* 472 F.2d 909, 917 (9th Cir. 1973). A working knowledge of English, of course, is required for immigrants to advance from alien to citizen. 8 U.S.C. § 1423 (1). As previously noted, the public schools are counted upon to provide this training in English. See RACIAL ISOLATION 1. To the extent, therefore, that petitioners to whom respondents are refusing to teach English are immigrants, the effect of respondents' policy is the same as almost 100 years ago, when San Francisco first denied citizenship

to Chinese immigrants. *In re Ah Yup*, 1 F. Cas. 223 (No. 104) (C.C.D.Cal. 1878). Regardless of whether respondents' present policy again singles out Chinese or whether other immigrants suffer from a similar denial of training in English, respondents' denial of educational opportunity offends *Graham v. Richardson*, 403 U.S. 365 (1971).

III

Where Respondents Fail to Provide Special Educational Services to Petitioners on the Same Basis as to Other Educationally Handicapped and Disadvantaged Students, Petitioners Are Denied Their Rights to Equal Protection

Approximately 8800 of the total of some 90,000 students in the San Francisco Unified School District were classified as mentally handicapped, educationally (emotionally) handicapped or physically handicapped in the school year 1968-1969. A. 94-95. All these students were receiving special training from respondents. *Ibid.* Petitioners and other non-English speaking students of Chinese origin have been aptly characterized by a Court of Appeals judge as "functionally deaf and mute." A. 142. They suffer from this disability because they are Chinese in national origin. In contrast to the 100% for other handicapped students, however, less than 40% (1066 out of 2866) of the Chinese whose disability may be associated with their ethnicity were offered special classes.

Students whose handicaps or needs for special educational assistance are regarded as resulting from poverty or cultural or linguistic isolation from the community at large are characterized in contemporary lexicon as "educationally disadvantaged." California State Dept. of Education, Guidelines: Compensatory Education 5 (Rev. 1972). The 2866 non-English speaking students of Chinese origin may thus more precisely be regarded as education-

ally disadvantaged youth. Respondents have identified 28,355 of the students enrolled in their schools in 1972-1973 as educationally disadvantaged youth or EDY. San Francisco Unified School Dist., Description of Federal & State Funded Projects 1972-1973, table following p. 31 (available at School District). State or Federally aided special educational services were provided to 24,698 EDY, or more than 85% of the total. When measured against this standard, once again the less than 40% of the non-English speaking Chinese EDY who receive special education is significantly smaller.

Even though education may not be a fundamental right in the constitutional sense, it is still:

> "an opportunity, where the state has undertaken to provide it . . . which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

It is no great feat to perceive that regardless of whether non-English speaking Chinese are characterized as handicapped or disadvantaged, they are less likely to receive special education than those whose disability is not a function of national origin. Petitioners, who receive no special education, are the victims of such disparate treatment. We submit that unless respondents can justify their action on ethnically neutral grounds, they are constitutionally bound not to discriminate against petitioners in dispensing special educational services. *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944).

On this basis, it was error to rule against petitioners on the ground that, as a matter of law, no sufficient claim of deprivation of a constitutional right was presented. This

Court should hold that petitioners have established a prima facie case of constitutionally proscribed discrimination. Respondents should be required to demonstrate that some basis other than petitioners' Chinese origin wholly explains the fact that they are among the more than 60% of the non-English speaking students similarly situated who receive no special training in English, while respondents are providing special training responsive to the needs of all or most of the other handicapped and disadvantaged students in the district. Failing such proof, petitioners are entitled to relief.

CONCLUSION

For the reasons set forth above, we urge that the cause be reversed and remanded with directions that respondent school board show cause, if it has any, for its discrimination in failing to teach English to petitioners, and, in the absence of constitutionally sufficient justification, for the determination of appropriate remedies to eliminate such discrimination.

Dated: July 30, 1973.

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